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## **Telecommunications Regulators, their role with regard to dispute settlement and their independence**

(Part of R. Hill, J. Watkinson (Gen. Eds.), *White Paper on Telecommunications Disputes: Specificities, Problems and Solutions*, September 1999)

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*One approach<sup>1</sup> would be to require all disputes to be submitted to regulators for resolution* or at least consider telecommunications regulatory authorities as usefull agents for dispute resolution. In this context it is understood that the concept of "regulator" does not mean an institution entrusted with the setting up of the regulatory rules (e. g. a Parliament) but one or more body(ies) concerned with the application of rules and the control of obedience to these rules<sup>2</sup>.

Telecommunications sector specific National Regulatory Authorities are entrusted, for example according to European telecommunications directives, with a large variety of regulation application and control tasks<sup>3</sup>. Among these tasks is to be listed dispute settlement. In this way, Article 9, 5 of the Interconnection Directive states that "in the event of an interconnection dispute between organisations in a Member State, the national regulatory authority of that Member State shall, at the request of either party, take steps to resolve the dispute within six months of this request. The resolution of the dispute shall represent a fair balance between the legitimate interests of both parties. In so doing, the national regulatory authority shall take into account,

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<sup>1</sup> This section has been primarily written by Robert Queck, EU-TMR Research Fellow, with input from Andreas Galtung.

<sup>2</sup> See for example Article 2, 1, b of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services.(OJ N° L 117/15, 07/05/1997) ("Licensing Directive") : "'national regulatory authority' means the body or bodies, legally distinct and functionally independent of the telecommunications organizations, charged by a Member State with the elaboration of, and supervision of compliance with, authorizations". Sometimes the limit might nevertheless become tiny as for example at least the drafting of licences by national regulatory authorities may be considered to some extent as being rule setting. The latter remark may also applie to standard setting.

<sup>3</sup> See for example Article 7 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ N° L 192/10, 24.07.1990) ("Services Directive") as modified by Article 1, 7 of Commission Directive 96/19/EC of 13 March 1996 amending Commission Directive 90/388/EEC regarding the implementation of full competition in telecommunications markets (OJ N° L 74/13, 22.03.96) ("Full Competition Directive"): "Member States shall ensure that from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and numbers as well as the surveillance of usage conditions are carried out by a body independent of the telecommunications organizations."

inter alia: the user interest, regulatory obligations or constraints imposed on any of the parties, the desirability of stimulating innovative market offerings, and of providing users with a wide range of telecommunications services at a national and at a Community level, the public interest (e.g. the protection of the environment), .... A decision on the matter by a national regulatory authority shall be made available to the public in accordance with national procedures. The parties concerned shall be given a full statement of the reasons on which it is based"<sup>4</sup>. Other directives provide in more general terms for dispute settlement procedures (or "Conciliation Procedures") involving National Regulatory (Telecommunications ) Authorities. In this way the ONP Leased Lines Directive states that "any user complaining that he has been or may be injured by the infringement of the provisions of this Directive, particularly regarding intra-Community leased lines, shall have the right to appeal to the national regulatory authority or authorities"<sup>5</sup>

In this context, some remarks are to be made:

a) When listing the tasks of National Regulatory Authorities, the European telecommunications directives in principle do not impose the obligation for a single NRA and the tasks to be carried out may be distributed among more than one body<sup>6</sup>. As consequence there is, under European law, the possibility of a (or even more) telecommunications NRA entrusted in particular with dispute settlement (see also *infra* ).

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<sup>4</sup> Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ N° L 199/32, 26/07/1997) ("ONP Interconnection Directive")

<sup>5</sup> Article 12, 1 of Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ N° L 165/27, 19.06.1992) ("ONP Leased Lines Directive"). See also Article 17, 2 of the ONP Interconnection Directive (*cit. supra* ) and Article 26 of Directive 98/10/EC of the European Parliament and of the Council on the application of Open Network Provision (ONP) to voice telephony and on Universal Service for Telecommunications in a competitive environment, OJ N° L 101/24, 1.04.1998 ("ONP Voice Telephony Directive II").

<sup>6</sup> See for example Article 5 a, 1 of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP) ( OJ N° L 192/1, 24.07.1990) ( "ONP Framework Directive") as introduced by Article 1, 6 of Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (OJ N° L 295/23, 29/10/1997) ("ONP Amendment Directive") : " where the tasks assigned to the national regulatory authority in Community legislation are undertaken by more than one body, Member States shall ensure that the tasks to be undertaken by each body are made public.". See also Article 2, 1, b Licensing Directive ( *cit. supra* ) according to which "'national regulatory authority' means the body or bodies, legally distinct and functionally independent of the telecommunications organizations, charged by a Member State with the elaboration of, and supervision of compliance with, authorizations".

b) Giving a telecommunications NRA dispute settlement tasks would allow to take profit from its sector specific competence and skills going, with regard to its specific sector of activities, beyond the general skills of institutions dealing with horizontal topics/issues like competition authorities or general courts. It must nevertheless be added that these telecommunications specific skills might be too narrow in a converging world. On the other hand, telecommunications specific dispute settlement procedures are foreseen "without prejudice to: ... (b) the rights of the person invoking the procedure in paragraphs 1 to 5 of this Article of the organizations notified in accordance with Article 11(1a) concerned or any other person under applicable national law, except in so far as they enter into an agreement for the resolution of issues between them"<sup>7</sup>. Parties have therefore the possibility to start a procedure before "normal" courts or before a specifically chosen arbitrator instead of invoking the national regulatory authority, entrusted with telecommunications specific dispute settlement. In this context it is worthwhile to note that the principles on the regulatory framework for basic telecommunications services, annexed to the Fourth Protocol to the General Agreement on Trade in Services<sup>8</sup>, provide also under point 2.5 Interconnection: dispute settlement that "a service supplier requesting interconnection with a major supplier will have recourse, ... to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below (*see infra*) , to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously". Here again, the independent domestic body may be another institution than the telecommunications NRA.

c) A dispute resolution authority must be objective, independent and impartial. This requirement calls especially for an independent regulator, a characteristic imposed upon telecommunications regulators already by general European telecommunications regulation<sup>9</sup>. In this sense Article 5 a

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<sup>7</sup> Article 12 ONP Leased Lines Directive (*cit. supra*). See also Article 26 ONP Voice Telephony Directive II (*cit. supra*) as well as Articles 17,1 ( disputes between organizations operating under authorizations provided by different Member States) and 9,5 (disputes between organizations in a Member State) ONP Interconnection Directive (*cit. supra*).

<sup>8</sup> Adopted on 15 February 1997, entry into force 5 February 1997. For the text of the Protocol and of the additional commitment on regulatory principles, see Council Decision 97/838/EC of 28 November 1997 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the results of the WTO negotiations on basic telecommunications services (OJ N° L 347/45, 18.12.1997).

<sup>9</sup> See Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ N° L 131/73, 27.05.1988) (" Terminal Liberalisation Directive") and Article 7 Services Directive ( *cit. supra* ) .

of the ONP Framework Directive<sup>10</sup> states: "2. In order to guarantee the independence of national regulatory authorities:

- national regulatory authorities shall be legally distinct from and functionally independent of all organisations providing telecommunications networks, equipment or services,
- Member States that retain ownership or a significant degree of control of organisations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control."

The independence must therefor exist on two levels, the level of the market and the "political", supervisory level. The requested effective structural separation between regulatory function and activities concerning ownership or control of one (or more) network operator or service provider has been further worked out in a declaration made by the representative of the Commission to the Telecommunications Council of 27 June 1996<sup>11</sup>. According to the declaration "the phrase 'a significant degree of control' implies that the government is in a position to influence the commercial behaviour of the state-owned or state-controlled network operator"<sup>12</sup>. The declaration furthermore shows that "the emphasis is on the effectiveness of the separation, not its form"<sup>13</sup> so that the "separation could be achieved in a number of ways depending on the legal and administrative traditions in a Member State"<sup>14</sup>. Structural separation must impeach anti-competitive information transfer and ensure "that the two activities of regulation and supervision/ownership have separate financial accounting, personal management, and reporting structures, and that no member of staff in either department faces a conflict of interest between the role of government as shareholder/owner , and the role of government as regulator"<sup>15</sup>.

In the same way, the principles on the regulatory framework for basic telecommunications services, annexed to the Fourth Protocol to the General Agreement on Trade in Services, foresee under point 5., Independent Regulators that "the regulatory body is separate from, and not

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<sup>10</sup> *Cit. supra* .

<sup>11</sup> Report of 7 June 1996 from the Committee of Permanent Representatives to the Council (Telecommunications) concerning the Proposal for a European Parliament and Council Directive amending Council Directives 09/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, 8125/96, ECO 170, CODEC 382, Annex 1.

<sup>12</sup> *Ibid.* .

<sup>13</sup> *Ibid.* .

<sup>14</sup> *Ibid.* .

<sup>15</sup> *Ibid.* .

accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants."

The taking over of dispute settlement by the sole telecommunications regulators may anyway be considered, at least in some countries, as not appropriate. Among the reasons which could be invoked are:

a) Lack of ressources, although this can be corrected and indeed is being corrected in some countries.

b) In some countries, the NRA may wish to limit its involvement in dispute resolution, particularly concerning disputes that do not appear to have a public policy component. On the other hand operators may prefer a "made-to-measure" solution involving a person or body deliberately chosen to settle one specific case.

C) Potential of breach of the general principle of separation between legislative, executive and judicial powers as NRA exercise typical functions of the executive branch while dispute settlement is typically the function of the judicial branch. This could lead the idea of taking away "judicial", dispute settlement powers from regulatory authorities<sup>16</sup> for admitting that in some cases they could be in the same time judge and party<sup>17</sup>. The problem appears nevertheless to be of a rather theoretical order by reason of the obligation of independence pending upon the NRA (see *supra* ), by reason of the existence of procedures for appealing against NRA decisions<sup>18</sup> and by reason of the possibility of giving the dispute settlement role to a specific NRA. In the latter

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<sup>16</sup> In this context the Belgian Council of State wrote, on the possibility to appoint members of the BIPT, the Belgian National Regulatory Authority as arbitrators for disputes arising between telecommunications operators, "ces personnes physiques ne peuvent être choisies au sein de l'IBPT, étant donné que l'Institut exerce une fonction régulatrice du marché des télécommunications, de telle manière qu'elles ne disposent pas de l'impartialité requise pour faire oeuvre juridictionnelle" Doc. parl., Chambre, 1265/1 - 97/98, p. 168.

<sup>17</sup> This could be the case if a NRA decides that a an undertaking is not entitled to avail itself of a general authorisation or withdraws an individual licence . In these cases nevertheless the relevant Licensing Directive provides that "Member States shall lay down a procedure for appealing against such a decision to an institution independent of the national regulatory authority (Licensing Directive - *cit. supra* , Articles 5, 3 and 9, 4). See also Article 5 a, 3 of the ONP Framework Directive as modified by the ONP Amendment Directive: " Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved."

<sup>18</sup> *Ibid.* .

case this NRA would have no other responsibilities than to intervene in dispute resolution and acquires therefore a more judicial nature.